

1509770 (Migration) [2016] AATA 4836 (22 December 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Saryu Bhanjibhai Dafda
CASE NUMBER:	1509770
DIBP REFERENCE(S):	clf2012/178055
MEMBER:	Wendy Banfield
DATE:	22 December 2016
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 22 December 2016 at 2:07pm

CATCHWORDS

Migration – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – Genuine and continuing relationship – Credibility issues – Site visit – Contradictory evidence

LEGISLATION

1. *Migration Act 1958*, s 65, s 5CB
Migration Regulations 1994, Schedule 2, r 1.09A(3), cl 801.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 8 July 2015 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 27 August 2012 on the basis of her relationship with her sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 because the requirements of a de facto relationship in accordance with s.5CB of the Act were not satisfied.
5. The applicant appeared before the Tribunal on 12 July 2016 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor Mr Amir Mohamad Rezai and from witness Mr Arjun Dafda. The Tribunal hearing was conducted with the assistance of an interpreter in the Hindi and English languages.
6. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.

7. *Evidence of the visa applicant*

8. The applicant came to Australia in May 2009 and claimed she undertook a course in 'Patisserie'. She met the sponsor in 2011 at a friend's dinner. According to the applicant, she made a mistake in a statement to the Department when she had said the meeting took place in 2010. The applicant could not recall who introduced them but said she and the sponsor were sitting together. The applicant said the sponsor was looking for accommodation and she knew of a place in the share house where she was living. The place did not suit him but the applicant said they began talking and going out to dinner. Although the sponsor is from Afghanistan, the applicant said they understand each other as they both speak Hindi.
9. The applicant was married previously but neither she nor the sponsor has children. The Tribunal asked when the parties began living together and she said she was not sure but went on to say the sponsor is a bricklayer and he was looking at different cities for work. She said he went to Adelaide and she thought they began living together either before or after he visited Adelaide. She thought it was around the end of 2011 when the sponsor moved in with her in a share house and they then rented their own house in Auburn. They have been living together since that time. At present the applicant's brother lives with the couple as well as a friend temporarily.
10. The applicant has a brother in Australia and parents and siblings in India. The sponsor has a sister in Perth and a brother in Sydney. She said she has met his brother. The sponsor's mother lives in Pakistan after moving from Afghanistan and the applicant has spoken to her, although she does not speak Hindi well. The applicant claimed she told her family when she began living with the sponsor and her mother accepted it as long as the parties marry eventually.

11. The Tribunal referred to the Department's decision and asked the applicant to comment on findings in relation to a site visit that was conducted to the applicant's mother and sister's home in March 2015. During the visit, the applicant's mother and sister told Departmental officers that they were aware of the sponsor but there was no relationship between him and the applicant. The applicant claimed that when the officers visited her mother there was a English and a Hindi speaker, however, her mother is not confident in either language as she speaks a local dialect. The applicant said her mother did not understand the word 'relationship' when she was asked.
12. The applicant wanted to explain that when her mother was interviewed, they were living on the second floor of a rented house and other people lived on the ground floor who she does not know. Initially, the officers were unable to ascertain where the applicant's family were living. The applicant claimed she then received a call at 9pm in Australia from a woman asking for her parent's address and phone number. The applicant said she was wary about giving information over the phone because she was unsure who the person was. The applicant said she did not think anyone from the Department of Immigration would call at that time. However, the officers eventually found the applicant's family home. The applicant explained that her mother was told people were asking after the family and this led to confusion because the applicant's sister was also dealing with immigration at the time. According to the applicant, her mother was unwell with chest pains and when the officers arrived, she was scared and did not know how to react. The officers asked the applicant's mother about the relationship between the applicant and sponsor and the applicant said her mother looked to her sister who knows some English. It was claimed her mother did not know their address in Australia but did know they were living together. The applicant offered her mother's phone number to the Tribunal but the Tribunal noted there are written statements from her parents.
13. The applicant told the Tribunal the officers asked 'leading' questions of her sister about her relationship including why the applicant would marry a Muslim when her family is Hindu. The applicant said today it is not necessary to be the same caste or religion, especially when living in Australia. The applicant said her sister did not know what to answer when asked questions by officers. The applicant declared her sister never said their father would not allow the applicant to marry a Muslim as claimed by the visiting officers. She said her sister responded by saying it is up to the applicant to decide.
14. The Tribunal asked the applicant why her account of the interview with her mother and sister would conflict so sharply with the Department's record of events. The applicant did not directly answer the question but again claimed the officers asked her sister questions that were leading somewhere regarding different religions and caste. The applicant said she and the sponsor are happy and do not follow their religions strictly.
15. The Tribunal asked the applicant to comment on her sponsor having declared he had spoken to her parents but later telling Departmental officers that he had not. The applicant said when the immigration officers called they spoke to her in English and the sponsor in Hindi. She said they did not introduce themselves but began asking questions. She claimed the sponsor did not take the interview seriously because he thought it was the police. This was because the parties had been thinking of calling police regarding the earlier phone call asking them for information. The applicant said the sponsor did not think he needed to give accurate information to the caller. The Tribunal asked the applicant how the police would have been aware of these issues. The applicant claimed she had wondered the same thing and concluded it was because the earlier caller had said they were in India when it appeared to be a local number.
16. The Tribunal put it to the applicant again that the sponsor changed his answer about having spoken to her parents when asked by the Departmental officers during the phone interview

as recorded in the Department's decision to refuse the visa. The applicant said she was with the sponsor at the time and it was not true that he changed his response. She added that he had spoken to her mother often.

17. The Tribunal next referred the applicant to the Department's decision in which the applicant and sponsor provided different accounts of when they met and began a de facto relationship. The applicant claimed she had made a mistake when she had said it was 2010 as it was actually 2011.
18. The applicant claimed the Department should have conducted a proper interview with her and the sponsor and her parents. When the Tribunal asked in what way, the applicant said the officers should have ascertained where her family lived rather than call her 'in the middle of the night' and make everyone confused. The applicant declared she and the sponsor want to continue with their life in Australia and get married. The applicant went on to say the sponsor could not remember her parents' names as it was difficult to do so. The applicant made further claims that her father was ill and her mother had been under a lot of stress.

19. Evidence of the sponsor

20. The sponsor confirmed the applicant's evidence that the parties met at a mutual friend's social event. He said at the time he was looking for a girlfriend and was also looking for a house so he spoke to the applicant about that. The sponsor and a friend went to look at the applicant's accommodation but they decided it was not suitable.
21. The Tribunal asked the sponsor to outline the development of the relationship between him and the applicant. He said they went to dinner together and then he moved into the same share house as the applicant. After a few weeks the parties decided to rent their own house together. The sponsor said he and the applicant had similar thinking so they decided to be boyfriend and girlfriend and have lived together ever since.
22. The sponsor was asked when the applicant first came to Australia and what she came for. He said it was to study but he does not know exactly when she came. He did not know what year she came but said they have been living together for five or six years, he also said his memory is not good and sometimes he forgets everything. The sponsor was then asked what the applicant had studied in Australia and he said he is not very literate and although the applicant would have told him, he did not remember what it was.
23. The Tribunal asked the sponsor about the site visit to the applicant's family in India. The Tribunal referred the sponsor to the fact that the applicant's mother and sister had said they were not in a relationship. The sponsor said that was not the fact, he and the applicant have been living together for in Australia for five or six years and the Department should have checked with them. The Tribunal reminded the sponsor the applicant had told the Department her family were aware they were living together but during the site visit, the family had said there was no relationship. The sponsor declared he did not know that much but said he and the applicant had not explained everything to her family. He said they were living together and were happy with each other but he had not talked to them about the relationship. The sponsor claimed he had spoken to the applicant's family once or twice but it was mainly just asking things like "how are you"? The sponsor claimed he had not thought it important to talk to the applicant's family about the relationship and he did not ask the applicant if she had told them.
24. The Tribunal put it to the sponsor that when he was contacted by phone and told Departmental officers were at the applicant's family home in India, he changed his previous response and said he had never talked to her family. The sponsor said when the officer called it was after 9pm and appeared to be a private number. The person said they were

from immigration but he felt it could be a friend who was trying to harass him. He said he was confused as to why the Department would call them at night. The sponsor said they discussed calling police about a harassing phone call. He said it was for this reason he did not talk to the caller in the right way. The sponsor said he later realised it was immigration officers on the phone but he was not given another opportunity to respond to them. The Tribunal asked the sponsor again about him having changed his answer about having spoken to the applicant's parents in the past. He said he did not make that claim and the Tribunal should check the records of the phone call.

25. The sponsor confirmed he has family in Pakistan as well as a brother in Sydney and a sister in Perth. He said the applicant has a brother in Australia, a sister in America and family in India. The sponsor said he and the sponsor love each other and plan to get married but have not planned when they will do that. The sponsor said he cannot live without the applicant even for a moment.

26. *Evidence of the witness – Mr Arjunsinh Dafda*

27. The witness is the brother of the visa applicant who lives in Sydney at the same residence as the applicant and sponsor. He was invited to make submissions about the relationship between the applicant and sponsor. Mr Dafda said the parties have been in a relationship for two or three years and are happy together. He said he understood the problem had been that the applicant got a phone call at 9pm at night and she got scared. He said the parties like each other, they go out on weekends and out to dinner and movies and they share a bedroom in the house.
28. Mr Dafda said his family in India are aware of the relationship and he does not think they have any problem with them living together, or the fact they are from different religions. He said he is aware that the sponsor talks to his parents sometimes. Mr Dafda said the sponsor helps him with various things such as study fees and he does not have a problem with his sister's relationship.

29. *Further evidence of the visa applicant*

30. The Tribunal advised the visa applicant it would be putting information to her that may be the reason for affirming the decision under review and she was invited to comment or respond. The information was that the sponsor told the Tribunal the parties had only become a couple once they got their own accommodation but she had said previously they shared a room in in their share house before that. The applicant said she believed the sponsor probably could not recall that. The Tribunal asked the applicant why the sponsor could not say when she came to Australia and what she had come to study. The applicant said she would have told him she came to study patisserie but the sponsor had not been to school and he did not understand, however she said he would have known it was something to do with cooking. The applicant said she did not think the sponsor had ever asked her when she came to Australia or how long she had lived here. The applicant added that the sponsor cannot read or write and she had to explain things to him like a child.
31. The Tribunal asked why the sponsor had said he did not know whether her family were aware they were a couple or not. The applicant said she and the sponsor would not say directly to her family and they would not ask if they were sharing a room or sleeping together out of respect but she claimed her family do know about it. The applicant said saying that two people are together is difficult to explain to her family.
32. The applicant was asked why she and her sponsor had said they have been together for five or six years when her brother said it was two or three years. The applicant said her brother has only been in Australia for two years and before that he was only 18 and lived in India.

She thought perhaps he did not know about it before he came to Australia. She said her mother would not have discussed with her brother that she was living with the sponsor and that they slept in the same room.

33. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

34. The issue in the present case is whether the applicant and sponsor are in a genuine and continuing de facto relationship.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

35. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse or de facto partner of the sponsoring partner, who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian permanent resident and was identified in the related Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

36. 'De facto partner' is defined in s.5CB of the Act and provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
37. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.

38. *Financial aspects of the relationship*

39. The Tribunal has considered the joint ownership of assets and joint liabilities, the extent of pooling of financial resources, any legal obligations owed to the other party and the sharing of day-to-day household expenses.
40. The applicant and sponsor provided some evidence of shared financial arrangements including a joint bank account statement, car insurance documents, tenant ledger and utility bills. The Tribunal accepts the applicant and sponsor have demonstrated some sharing of day to day expenses.

41. *Nature of the household*

42. The applicant and sponsor have provided evidence of shared accommodation in the form of a tenant ledger detailing rental payments. They also submitted utility bills in joint names at the same address in Merrylands New South Wales. The evidence supports the applicant's claims that the parties may share an address but does not provide any insight into the nature of the relationship. The applicant and sponsor both claimed they have lived together since 2011 when they moved from a share house to their own rental property. In evidence to the

Tribunal the applicant's brother said the parties have been together for two or three years, not five or six as the applicant and sponsor have said. The applicant explained her brother was probably not told about it while he was still in India and only knew since coming to Australia in 2013.

43. The Tribunal had asked the applicant to comment on the Department's decision to refuse the visa and in particular, the visit to the applicant's family in India by Departmental officers where her mother and sister had said they were aware of the sponsor but there was no relationship between him and the applicant and the applicant was single. The applicant gave a number of explanations for her mother and sister's response. These were that her mother did not speak English or Hindi well as she predominantly speaks a local dialect and therefore did not understand the officers when she was asked about the relationship. The Tribunal does not accept this claim as there is no evidence the applicant's mother did not understand and in fact, according to the Department's decision that was provided by the applicant, the answers provided were quite specific, including that the applicant was not married, was not in any relationship, was not planning to get married and was not in a relationship with the sponsor.
44. The applicant also gave a detailed response about the site visit which included what she said were difficulties in the Departmental officers finding where her family lived, an evening phone call she received that she said caused confusion to her and the sponsor and her mother being unwell at the time as well as being scared and confused by the visit. She declared that she and the sponsor were alarmed by the evening call as it was 9pm and they did not think the Department would genuinely contact them then, and for that reason they did not provide correct information and the sponsor did not take the questioning seriously. The applicant also said she and the sponsor thought it may be the police calling, although she did not say how the police would have known anything about the matter when the parties had only considered calling them but would not have done so.
45. The Tribunal is not satisfied with the applicant's response to the information put to her that her mother and sister provided answers to Departmental officers that contradicted hers about the existence of a de facto relationship with the sponsor. None of the applicant's explanations account for the fact that her family members said she was single; she was not getting married, was not in any relationship, engaged or planning to get married and was not living with the sponsor. The applicant acknowledged her mother did not declare any language difficulties during the interview, and there is no evidence she told the officers she was unwell or confused by their visit.
46. Although the applicant later submitted statements from her mother, father and sister stating they were aware of the relationship, the Tribunal prefers the evidence obtained by the Department during the site visit as being truthful, rather than the applicant's attempts after the fact to explain the contrary information provided by her family because it does not support her claims. The Tribunal has taken all of the applicant's claims into account but is not satisfied any of the reasons given are credible explanations for why her mother and sister said the applicant was single and was not in a relationship when she had said they were aware she was living with the sponsor in a committed relationship.

47. *Social aspects of the relationship*

48. The Tribunal considered whether the parties represent themselves to other people as being in a spouse relationship, the opinion of friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities.
49. The Tribunal accepts the applicant and sponsor provided some witness statements from people who declare they are aware of a relationship between the applicant and sponsor,

however, they are not sufficient to outweigh the concerns the Tribunal has about the nature of the household and the nature of the parties' commitment to each other. In addition, the Tribunal is of the view the applicant and sponsor did not present themselves as being in de facto relationship to the applicant's family, despite claiming the family were aware and were supportive.

50. Nature of persons' commitment to each other

51. During the hearing, the Tribunal asked the applicant why the sponsor did not know when she came to Australia or what she had come to study. The applicant claimed she would have told him but the sponsor was uneducated and he did not understand. She said he knew it was something to do with cooking, however, the Tribunal notes the sponsor did not say that, he claimed he did not know at all. The applicant said she did not think the sponsor had ever asked her when she came to Australia or how long she had lived here. Despite the applicant's claims of the sponsor not having much schooling and being illiterate, after five years together it would be expected that they would know about each other's backgrounds, including such fundamentals as when the applicant came to Australia and what she studied. The Tribunal is not satisfied the applicant has demonstrated the parties provide each other with companionship and emotional support or that they see the relationship as long-term.
52. The Tribunal asked the applicant why the sponsor had said he did not know whether her family were aware they were a couple. The applicant said they would not say to their family, and the family would not ask if the couple were sharing a room or sleeping together out of respect but declared her family do know about it. The applicant said saying that two people are together is difficult to explain to her family. The Tribunal finds the applicant has tried to give the impression that answering simple questions was complicated and that everyone involved was confused by the Department merely seeking to verify the claims made by the applicant. The Tribunal is not satisfied there was anything confusing or improper in the Department conducting a site visit and in making contact with the applicant and sponsor by phone in the evening. The Tribunal does not accept the Departmental officers would have gone against established procedure and not identified themselves or explained the reason for their visit or call. Even if there was any confusion on the part of the applicant's family, it does not explain why they would give answers that directly contradict the applicant's claims.
53. The applicant claimed her sister did not say her father would not allow her to marry a Muslim, her mother did not say the applicant and sponsor were not in a relationship and the sponsor did not change his answer and say he had never spoken to the applicant's parents. The Tribunal is not satisfied that it is sufficient for the applicant to just deny certain statements were made by her family members and the sponsor. In addition, the applicant claimed both that the sponsor did not think he needed to give accurate information to the person on the phone as he was not sure it was the Department calling, and that it was not true the sponsor changed his response once he was told Departmental officers were at the home of the applicant's family. The Tribunal is of the view the applicant has given whatever response will benefit her application for a visa.
54. Clearly the applicant and sponsor as well as her mother and sister had no prior notice when contacted by the Department resulting in Departmental officers finding that in fact, the applicant's family did not know about any de facto relationship between her and the sponsor. This contradicted the applicant's own evidence to the Department and it appears the subsequent statements by family members and the applicant's explanations to the Tribunal have been attempts to disclaim the true information provided. For these reasons, the Tribunal is not satisfied the applicant has demonstrated she and the sponsor are in a long term committed relationship.

55. Having regard to all the circumstances, on balance, the Tribunal is not satisfied that the applicant and sponsor have a mutual commitment to a shared life as partners to the exclusion of all others, or that the relationship is genuine and continuing.
56. On the basis of the above the Tribunal is not satisfied that the requirements of s.5CB(2) are met at the time of decision. Therefore, the applicant does not meet cl.801.221(2)(c).
57. Furthermore, the applicant has not claimed, and there is no evidence before the Tribunal, that the applicant meets the alternative criteria in cl.801.221 (2A), (3), (4), (5) or (6).
58. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa

DECISION

59. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Wendy Banfield
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:

- (a) a Partner (Migrant) (Class BC) visa; or
- (b) a Partner (Provisional) (Class UF) visa; or
- (c) a Partner (Residence) (Class BS) visa; or
- (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:

- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
- (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
- (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
- (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.

- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).